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## The Support Law and the Equal Rights Amendment in Pennsylvania

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## THE SUPPORT LAW AND THE EQUAL RIGHTS AMENDMENT IN PENNSYLVANIA

The law has long recognized the family as the basic social and economic unit of civilization's complex structure.<sup>1</sup> Embodied in the legislature and the courts, the law has been striving over the centuries to preserve the concept of the family by enforcing the rights and correlative duties of its members so that it might best perform its function within our cultural organization. To accomplish its goal, it is necessary that the basic family remain a financially feasible unit, and to this end the law has evolved a system wherein certain members of the family become liable for the support of other members. Legislators and courts have chosen to assign duties and rights to support on the basis of sex.<sup>2</sup> The assignment has distinct advantages. It is easy to administer, clearly definable and unilaterally enforceable. It reflects a traditional and accepted vision of the family that status within its structure and behavioral roles be determined by sex.<sup>3</sup>

On May 18, 1971 the people of Pennsylvania voted to amend Article 1 of the Pennsylvania Constitution to include section 27.<sup>4</sup> The new amendment has been called the equal rights amendment and it reads:

Prohibition Against Denial or Abridgement of Equality of Rights because of Sex. Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual.<sup>5</sup>

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1. The courts have long declared themselves the protectors of the state's interest in family relationships. For a recent case where this state interest is verbalized, see *Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 164 (1972).

2. See, e.g., PA. STAT. ANN. tit. 18, § 4731 (1963), § 4733 (Supp. 1972); PA. STAT. ANN. tit. 48, § 131 (1965); PA. STAT. ANN. tit. 19, § 1151 (1964).

3. See J. REED, *PENNSYLVANIA BLACKSTONE*, vol. I (1831):  
By marriage, the husband and wife are one person in law: that is, the very being, or legal existence of the woman, is suspended during the marriage, or, at least, is incorporated and consolidated into that of the husband. . . . Upon this principle of a union of person, husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage.  
*Id.* at 221.

For a more modern discussion of this concept, see *United States v. Yasell*, 388 U.S. 341 (1966), particularly the dissenting opinion of Mr. Justice Black at 361.

4. PA. CONST. art. I, § 27.

5. *Id.*

The new amendment is likely to call into question laws which approach regulation of family affairs from the point of view that status within the family is predetermined by sex. Already the ancient and entrenched law of support has been brought under review to be tested by the terms of the equal rights amendment.<sup>6</sup> This Comment will examine the force of Article 1, section 27 of the Pennsylvania Constitution on the existing body of support law. Since the central issue is the question of the legal relationship of one sex to the other in marriage, the discussion herein will be limited to the obligations existing between husband and wife. In order to give the most simplified view of the area, variations on this most basic family theme will be touched on only collaterally.

### I. DEVELOPING THE SUPPORT LAW

Initially, the burden of the obligation to support a family fell on the shoulders of the husband and father.<sup>7</sup> The common law found a moral duty for a man to support his wife and early statutes soon spelled that obligation into written law.<sup>8</sup> Additional statutes and amendments to existing statutes have, over the years, served to bolster and assist the basic common law rights to support.<sup>9</sup> The courts continue to speak in terms of a husband's legal and moral obligation to provide for his family as it was originally viewed at common law.<sup>10</sup>

The courts' selection of the man of the family as the logical party to bear the brunt of its finances was not entirely arbitrary. Women under the common law were severely disadvantaged to the point where they were virtually unable to provide adequately for themselves, let alone others.<sup>11</sup> Those legal disabilities which

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6. *Corso v. Corso*, 120 Pitts. L.J. 183 (Pa. C.P. 1972).

7. This has been the law of long standing duration and it has obtained to a greater or lesser degree in all jurisdictions. See generally Brown, Emerson, Falk and Freeman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 944 et seq. (1971). For a rough history of the rationale of this custom in Pennsylvania, see *Corso v. Corso*, 120 Pitts. L.J. 183 (Pa. C.P. 1972).

8. *Commonwealth v. Nathans*, 2 Pa. 138 (1846). The court interpreted the Act of June 13, 1836, PA. STAT. ANN. tit. 62, § 1981, relating to desertion and nonsupport of wives by husbands and of children by parents of either sex.

9. *Clark v. Clark*, 17 Pa. D. & C. 500 (M.C. Phila. Co. 1932): The act of May 23, 1907, P.L. 227 being in aid of a well-established common law right should be liberally construed particularly in the light of its just and beneficent purpose. *Id.* at 503. The act referred to is in force at present, slightly amended, in PA. STAT. ANN. tit. 48, § 131 (1965).

10. E.g., *Walbert v. Farina*, 411 Pa. 400, 192 A.2d 404 (1963).

11. For review of some of women's legal disabilities under the common

existed for women when the support law first evolved have been largely alleviated,<sup>12</sup> but the basic support law defining the husband's duty remains unchanged. Its intent is to provide for the support and maintenance of the man's wife and children.<sup>13</sup> The family is entitled to a reasonable allowance that is consistent with the husband's income and their station in life. Also the courts candidly recognize the state's particular interest in the well-being of its citizenry due to its financial investment in terms of public assistance for those unable to support themselves. Thus it is not the least intent of the law to save some part of what is expended by the state in subsidizing families in which the man has in some way failed in his responsibility.<sup>14</sup>

In return for the benefit of lifelong support in marriage, the wife was deemed to owe certain duties to her husband. Her services, as correlatives to his duty to support, were originally quite heavy, but although not completely abrogated, in recent years they have been reduced to a more tolerable load. For example, in the last century all a wife's earnings were considered to belong absolutely to her husband no matter how she obtained her income or how he saw fit to spend it.<sup>15</sup> This situation has since been corrected by the Act of June 3, 1887,<sup>16</sup> but the courts still mention the household services the married woman is obligated to perform in order to justify her husband's support. "The husband, of course, is bound to support his wife, but only in accordance with his means; and the wife, living with her husband and claiming support, should in turn perform her wifely duties."<sup>17</sup> The wife's marital obligations are primarily left to the imagination although courts will refer on occasion to "the solemn vows and promises mutually made."<sup>18</sup> The one duty that is clearly defined in Pennsylvania and other jurisdictions is that of the wife to live in the home that her

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law, see Reed, *PENNSYLVANIA BLACKSTONE*, *supra* note 2, at 221 *et seq.* See also, M. Eastwood, *The Double Standard of Justice: Women's Rights under the Constitution*, 5 VALP. L. REV. 281 (1971).

12. See M. Griffiths, *The Law Must Reflect the New Image of Women*, 23 HAST. L.J. 4 (1971) for a discussion of some more recent court decisions improving women's legal status.

13. *E.g.*, *Gitman v. Gitman*, 428 Pa. 387, 237 A.2d 181 (1967); *Kallen v. Kallen*, 200 Pa. Super. 507, 190 A.2d 175 (1963); *Hyle v. Hyle*, 188 Pa. Super. 20, 145 A.2d 889 (1958).

14. See, *e.g.*, *Estate of Worell*, 61 Pa. 105 (1869). For a more modern view see *Comm'r. v. Rankin*, 280 F.2d 160 (3d Cir. 1959).

15. *E.g.*, *Appeal of McDermott*, 106 Pa. 358 (1884); *Appeal of Speakman*, 71 Pa. 25 (1872).

16. PA. STAT. ANN. tit. 48, § 34 (1965) (married women entitled to their separate earnings).

17. *Austin v. Austin*, 282 App. Div. 493, 124 N.Y.S.2d 900 (1953). For Pennsylvania's requirement of marital obligations, see *Clark v. Clark*, 17 Pa. D. & C. 500 (M.C. Phila. Co. 1932). Wifely duties are not compensable since the relationship of the wife as a housewife in the household of the husband is not one of employment. *Freppon v. Hittner*, 91 N.J. Super. 9, 218 A.2d 890 (1966).

18. *Austin v. Austin*, 282 App. Div. 493, 496, 124 N.Y.S.2d 900, 902.

husband provides for her, in the place of his choosing.<sup>19</sup> His choice is controlling as long as it is made in good faith, and the wife is constrained to move wherever his work, his comfort or even his convenience requires<sup>20</sup> in order to perform her services and regale him with her society.<sup>21</sup>

#### A. *The Major Statutes*

The bulk of support law as it is presently enforced is delineated in numerous statutes which attempt to deal with the situation from every conceivable point of view. They are overlapping and redundant, and they provide a multitude of remedies of greater or lesser effectiveness for the selection of the injured party. A husband's primary obligation of support and a wife's right to receive maintenance are set forth both civilly and criminally in no less than four major statutes.<sup>22</sup> The civil statute which defines the right of action for support and maintenance begins:

If any man shall separate himself from his wife or children without reasonable cause, and, being of sufficient ability, shall neglect or refuse to provide suitable maintenance . . . action may be brought. . . .<sup>23</sup>

It has been held that the obligation is assumed as an incident of marital status and cannot be avoided by separation.<sup>24</sup> The sufficiency of the husband's ability is not necessarily measured by his actual income where the court finds that it does not reflect his capacity to earn. Thus in one case, a husband was not excused from supporting his wife even though he was drawing no salary while working for his parents, since as a pharmacist he could be expected to find a more financially rewarding position elsewhere.<sup>25</sup> If the wife is forced to deplete her private estate in supporting herself when her husband fails to provide, he must reimburse her expenditures.<sup>26</sup> The law imposes a quasi-contractual relationship to repay the wife or any other party who by supplying the wife with

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19. *E.g.*, *Yohey v. Yohey*, 205 Pa. Super. 329, 208 A.2d 902 (1965); *Commonwealth ex rel. Fernandes v. Fernandes*, 202 Pa. Super. 542, 198 A.2d 425 (1964).

20. *E.g.*, *Yohey v. Yohey*, 205 Pa. Super. 309, 208 A.2d 902 (1965).

21. *See, e.g.*, *Eldridge v. Eldridge*, 38 N.J. Super. 509, 11 A.2d 483 (1955).

22. PA. STAT. ANN. tit. 18, § 4731 (1963), § 4733 (Supp. 1972); PA. STAT. ANN. tit. 19, § 1151 (1964); PA. STAT. ANN. tit. 48, § 131 (1965).

23. PA. STAT. ANN. tit. 48, § 131 (1965).

24. *E.g.*, *Samuels v. Hirz*, 189 Pa. Super. 492, 151 A.2d 640 (1959).

25. *Commonwealth ex rel. Wiczorkowski v. Wiczorkowski*, 155 Pa. Super. 517, 38 A.2d 347 (1944).

26. *Adler v. Adler*, 171 Pa. Super. 508, 90 A.2d 389 (1952).

items necessary for her maintenance has conferred a benefit on the erring husband.<sup>27</sup>

The criminal statutes relating to support cover much the same substantive ground as the civil statute, providing redress for a wife or family deserted or neglected by the husband. There are two sections in the Criminal Code that set forth the husband's liability:<sup>28</sup> Section 4731, providing for punishment of the delinquent spouse for his failure to meet his obligations,<sup>29</sup> and section 4733 which is intended not to punish but to secure a reasonable allowance for the family's support.<sup>30</sup> A support proceeding brought under the latter section is held to be not a criminal prosecution but one instituted under a quasi-criminal statute.<sup>31</sup> The courts have found that it is the intent of the legislature in this section to provide a method by which a wife, deserted and deprived of support, could seek assistance in securing a proper amount to preserve herself and children in comfort. Of course, the civil remedy set forth in the Marriage Law<sup>32</sup> provides a method for accomplishing substantially the same ends. By the quasi-criminal statute, the court is empowered to order the payment of an amount which it finds reasonable for support of the family and to commit the defendant to prison should the circumstances of the case demand such action. This dual remedy is very popular with litigants and by far the largest number of support actions are brought under this statute.<sup>33</sup> Proceedings against a deserting husband can be maintained concurrently under sections 4731 and 4733, but under section 4731, which is a criminal statute, the charge of desertion becomes a misdemeanor.<sup>34</sup>

Title 19, Criminal Procedure,<sup>35</sup> provides for more detailed disciplinary action in a case of desertion and non-support. Section 1151,<sup>36</sup> entitled "Power to commit to prison; payments on account

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27. *Id.*

28. PA. STAT. ANN. tit. 18, § 4731 (1963) (willful separation or non-support) and § 4733 (Supp. 1972) (desertion and nonsupport).

29. *E.g.*, Commonwealth v. Greene, 173 Pa. Super. 315, 98 A.2d 202 (1953).

30. *E.g.*, Commonwealth *ex rel.* Gitman v. Gitman, 428 Pa. 387, 237 A.2d 181 (1967).

31. Commonwealth *ex rel.* Bundy v. Bundy, 159 Pa. Super. 153, 42 A.2d 537 (1946). *See also* Comm'r. v. Rankin, 270 F.2d 160 (3d Cir. 1959). The differences between the civil and criminal remedy are discussed in this case. As interpreted by this court the differences between the two actions were partially based on the fact that they were brought in separate courts: criminal nonsupport in the Court of Quarter Sessions and the civil action, separate maintenance, in the Court of Common Pleas.

32. PA. STAT. ANN. tit. 48, § 131 (1965).

33. *See* PA. STAT. ANN. tit. 18, § 4733 (Supp. 1972) and notes of numerous decisions cited therein.

34. *E.g.*, Commonwealth v. Widmeyer, 149 Pa. Super. 91, 26 A.2d 125 (1942).

35. PA. STAT. ANN. tit. 19, § 1151 (1964).

36. *Id.*

of labor; security for compliance," again gives the court authority to commit the defendant to prison, and at hard labor, should he fail to give security for compliance when he was possessed of the means to do so or likely to dissipate his assets or flee the jurisdiction. The procedure is intended as punishment for contempt of court as shown by defendant's failure to discharge his duty to his family.<sup>37</sup> There is no provision within this statute giving the court authority to make or modify a support order.

### B. *Proving the Right to Support*

In order to bring any or all of these laws into action, a wife must first prove her right to receive support. Whether she is proceeding civilly or criminally, it is incumbent on the wife to prove separation without reasonable cause or neglect to maintain.<sup>38</sup> The language in the three statutes defining the duty is virtually identical on this point. If the wife can show the husband has in fact deserted her, she is entitled to such an award of support as the court deems just and proper. Usually in a desertion case this presents very little problem, however there are occasionally close cases. In one instance, a husband spent his time away from home and slept in a separate residence, but he continued to stop by the marital domicile to drop off food and clothing of his choosing for his family. The court found as a fact that such behavior amounted to separation and that the wife was entitled to a cash payment for support in order to purchase her own food and necessities, and that of her family.<sup>39</sup>

The husband's behavior can constitute "separation without reasonable cause" without his actually moving out of the house: his conduct could be so atrocious as to drive his wife away from him.

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37. *Commonwealth v. Peters*, 178 Pa. Super. 82, 113 A.2d 327 (1955).

38. The three statutes relating to the husband's duty all agree that the husband must separate himself from his wife or children without reasonable cause or neglect to maintain them in order to give rise to enforcement proceedings. PA. STAT. ANN. tit. 48, § 131 (1965): "If any man shall separate himself from his wife or children without reasonable cause, and, . . . shall neglect or refuse to provide reasonable maintenance for said wife or children, action may be brought." PA. STAT. ANN. tit. 18, § 4731 (1963): "Whoever . . . separates himself from his wife or from his children . . . without reasonable cause, or wilfully neglects to maintain his wife or children. . . ." PA. STAT. ANN. tit. 18, § 4733 (Supp. 1972): "If any husband or father . . . separates himself from his wife or from his children . . . without reasonable cause, or neglects to maintain his wife or children. . . ."

39. *Commonwealth ex rel. Iezzi v. Iezzi*, 200 Pa. Super. 584, 190 A.2d 334 (1963).

This ploy does not defeat her right to support merely because it was not the husband who literally deserted. She need only leave the home as a result of conduct which would amount to "legal justification" for separation.<sup>40</sup> She is not required to establish facts that would entitle her to a divorce to claim such legal justification, but must only show an adequate reason in law.<sup>41</sup> If the husband should consent to the wife's departure, even though she lacks legal justification, her right to support continues.<sup>42</sup> He may only terminate that right by a good faith request for her return to resume the marital relation.<sup>43</sup>

The matter of desertion and non-support as described above, in which the wife must prove separation without cause, comes frequently to the court's attention. But the law contemplates another class of cases by including in the statute a second provision written in the disjunctive: "or neglects to maintain his wife or children . . .".<sup>44</sup> Under either non-support section of the Criminal Code a wife may successfully bring an action for support without proof of desertion by depending on this phrase, provided she can show neglect to maintain.<sup>45</sup> Thus an action for support is occasionally brought against a husband in the course of an ongoing marriage where the parties are still living together as a family unit. Understandably, the courts hesitate to reach into the home and judicially determine the household budget. In the words of one court "the statute was never intended to constitute a court a sounding board for domestic financial disagreements. . .".<sup>46</sup> A justifiable fear can be spotted behind the court's language that it would be pressured into arbitrating the monetary disputes of families whose names are legion, impinging the court's dignity and crowding its dockets. This concern, however, has not stopped the Pennsylvania courts from proceeding in such a case where it feels the facts warrant an order of support. Where neglect to maintain is clearly shown, the fact that the parties are living together is no defense.<sup>47</sup> A clear showing of neglect generally requires proving a lack of the most

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40. *Darges v. Darges*, 202 Pa. Super. 330, 195 A.2d 847 (1963).

41. *Id.* Legal justification for the wife's withdrawal has been recognized in cases where the husband drank to excess and watched obscene films in the basement. *Darges v. Darges*, 202 Pa. Super. 330, 195 A.2d 847 (1963); where the husband made immoral advances to the wife's son, *Doelp v. Doelp*, 219 Pa. Super. 420, 281 A.2d 721 (1971); or where he committed such indignities to the wife as were "humiliating, degrading and inconsistent with her position and relations as a wife." *Wick v. Wick*, 352 Pa. 25, 28, 42 A.2d 76, 78 (1945) *quoting from* *Donnelly v. Donnelly*, 76 Pa. Super. 92, 95 (1921).

42. *E.g.*, *Commonwealth ex rel. Davidoff v. Davidoff*, 178 Pa. Super. 549, 115 A.2d 892 (1955).

43. *Id.*

44. PA. STAT. ANN. tit. 18, § 4731 (1963), § 4733 (Supp. 1972).

45. *Commonwealth v. Peters*, 178 Pa. Super. 82, 113 A.2d 327 (1955).

46. *Commonwealth v. George*, 358 Pa. 118, 123, 56 A.2d 228, 231 (1948).

47. *Commonwealth ex rel. Turner v. Turner*, 192 Pa. Super. 502, 161 A.2d 922 (1960).



basic necessities such as food, clothing or payment of rent and utilities.<sup>48</sup>

### C. *Losing the Right to Support*

The right of a wife to support can be lost at any time. Upon proof that the wife is unworthy of support, her right can be defeated before any order is entered or upon review of an order already in force.<sup>49</sup> Conduct on the wife's part which would give the husband sufficient grounds for a divorce justifies his refusal to support her and constitutes the most widely used argument to defeat her right.<sup>50</sup> She is also considered unworthy if she has separated herself from the husband's home and is unable to establish legal justification for leaving or to prove her husband's consent.<sup>51</sup> Pennsylvania law allows a wife to lose her right to support on yet another ground: the entry of an absolute divorce decree.<sup>52</sup> The divorce law<sup>53</sup> makes no provision for permanent alimony where the parties have obtained an absolute divorce from the bonds of matrimony and the courts have consistently held that no duty of support is owed to a divorced wife by a former husband.<sup>54</sup> Should a divorce be obtained and alimony decreed in another state, Pennsylvania courts will still refuse to enforce a support order where the parties are effectively divorced.<sup>55</sup>

### D. *Rights and Liabilities Under Other Statutes.*

The rights and duties of the wife and other family members are not limited to situations where desertion or neglect have oc-

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48. See, e.g., *Commonwealth v. Peters*, 178 Pa. Super. 82, 113 A.2d 327 (1955) where wife was required to take meals with friends and family due to lack of husband's support; *Commonwealth v. Gauby*, 64 Berks 54 (Pa. C.P. 1971) where "another woman" was involved who received presents from the defendant while he failed to provide food, clothing, and incidentals to his family.

49. *Commonwealth ex rel. McCuff v. McCuff*, 196 Pa. Super. 320, 175 A.2d 124 (1961).

50. E.g., *Commonwealth ex rel. McCuff v. McCuff*, 196 Pa. Super. 320, 175 A.2d 124 (1961); *Commonwealth ex rel. Davidoff v. Davidoff*, 178 Pa. Super. 549, 115 A.2d 892 (1955).

51. *Commonwealth ex rel. Shapiro v. Shapiro*, 204 Pa. Super. 135, 203 A.2d 369 (1964).

52. E.g., *Commonwealth ex rel. Jones v. Jones*, 216 Pa. Super. 1, 260 A.2d 809 (1969). See also *Hooks v. Hooks*, 123 Pa. Super. 507, 187 A. 245 (1936) for history and development of the statutes relating to divorce and alimony.

53. PA. STAT. ANN. tit. 23, §§ 1-98 (1955).

54. See note 52 and accompanying text *supra*.

55. *Commonwealth ex rel. Bortin v. Bortin*, 210 Pa. Super. 355, 234 A.2d 55 (1967).

curred. Further rights are established for the wife in two sections of the divorce law. Title 23, section 46 provides "[i]n case of divorce from the bonds of matrimony or bed and board, the court may . . . allow a wife reasonable alimony pendente lite and reasonable counsel fees and expenses."<sup>56</sup> This action is different in character from an order of support since its purpose is not one of maintenance.<sup>57</sup> Rather it is intended to provide a woman with the necessary financial backing to prosecute or defend a suit until a final decree is entered.<sup>58</sup> A wife might also sue for a divorce from bed and board<sup>59</sup> and obtain what is essentially a legal separation<sup>60</sup> with the husband's duty of support still intact.<sup>61</sup>

There is only one situation in Pennsylvania where permanent alimony is allowed and it is available to either spouse. In the case where a spouse obtains a divorce from an insane husband or wife, the court can decree alimony for the support of the insane spouse for the term of his natural life.<sup>62</sup> Also available to any family member is the statutory remedy<sup>63</sup> providing that "[t]he husband, wife, child . . . father and mother of every indigent person, whether a public charge or not, shall, if of sufficient financial ability, care for and maintain or financially assist, such indigent person. . . ."<sup>64</sup> By the terms of this statute either spouse has a duty to support the other if one should be rendered indigent and one remain financially able to maintain him. If any local public assistance program assumes this burden, the defaulting spouse is liable to reimburse that program up to the amount expended in financial assistance.<sup>65</sup> This liability, of course, is not as extensive as the husband's primary obligation to support his family, but arises only when a party is indigent and in the way to becoming a public charge.

Throughout this tangle of law and common law and overlapping statutes relating to support the courts have chartered a course enforcing the defaulting spouse's duties according to the facts of each separate case and using a good deal of judicial discretion. In the midst of the verbiage surrounding the law, two statutory areas stand out as being of great practical value. These are the Uniform Reciprocal Enforcement of Support Act<sup>66</sup> and the Pennsylvania

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56. PA. STAT. ANN. tit. 23, § 46 (Supp. 1972).

57. *Belsky v. Belsky*, 196 Pa. Super. 374, 175 A.2d 348 (1962).

58. *Rutherford v. Rutherford*, 152 Pa. Super. 517, 32 A.2d 921 (1943).

59. PA. STAT. ANN. tit. 23, § 11 (1955).

60. A legal separation does not exist as such in Pennsylvania, the only remedy available to achieve this end being the divorce from bed and board.

61. For a review of the history and effectiveness of this remedy, see the opinion in *Corso v. Corso*, 120 Pitts. L.J. 183 (Pa. C.P. 1972).

62. PA. STAT. ANN. tit. 23, § 45 (1955).

63. PA. STAT. ANN. tit. 62, § 1973 (1968).

64. PA. STAT. ANN. tit. 62, § 1973(a) (1968).

65. *McGlothlin v. Pennsylvania R. Co.*, 72 F. Supp. 176 (E.D. Pa. 1947).

66. PA. STAT. ANN. tit. 62, § 2043.1-30 (1968).

Civil Procedural Support Law.<sup>67</sup> The Uniform Reciprocal Enforcement of Support Act has stated its purpose "to improve and extend by reciprocal legislation the enforcement of duties of support and to make uniform the law with respect thereto."<sup>68</sup> It serves to enforce duties of support imposed by any state in which a similar reciprocal law has been enacted.<sup>69</sup> The Civil Procedural Support Law provides a procedure for enforcing existing support rights of dependents allowing for attachment of property and earnings and conferring powers and imposing duties on the courts uniformly throughout the various counties in the state.<sup>70</sup> These two laws were enacted as remedies "in addition to, and not in substitution" for any other proceedings for support.<sup>71</sup> They changed none of the existing law but they are quite capable of standing by themselves and single-handedly accomplishing those remedies which the profusion of support statutes under other titles now attempts to cover.<sup>72</sup>

## II. CONSTITUTIONALLY SUSPECT AREAS

As it is presently stated, Pennsylvania's support law is open to criticism in terms of the Pennsylvania Equal Rights Amendment. The review set forth above brings to light court enforced liabilities which fall with suspicious weight on one sex alone. Predominant is the fact that obligations for the support of the family are primarily the lot of the husband-father, thus suggesting that equality of rights under the law is somehow being abridged because of the sex of the individual. The wife shares liability equally with the man only when permanent alimony is awarded where the respondent is insane<sup>73</sup> and as among the relatives liable for the

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67. PA. STAT. ANN. tit. 62, § 2043.31-44 (1968).

68. PA. STAT. ANN. tit. 62, § 2043.1 (1968).

69. Commonwealth *ex rel.* Shaffer v. Shaffer, 175 Pa. Super. 100, 103 A.2d 430 (1954); Commonwealth v. Mexal, 201 Pa. Super. 457, 193 A.2d 680 (1963), in which the wife deserted to another jurisdiction and support was nevertheless enforced on the grounds that the remedy does not depend on the flight of the father, but upon a breach of duty to support which exists without regard to residence of the parties.

70. Commonwealth *ex rel.* Jones v. Jones, 216 Pa. Super. 1, 260 A.2d 809 (1969).

71. PA. STAT. ANN. tit. 62, § 2043.3 (1968) (remedies additional to those now existing); PA. STAT. ANN. tit. 62, § 2043.33 (remedies additional to those now existing).

72. In 1971 Illinois repealed that section of its laws providing for support of the family by the husband. ILL. ANN. STAT. ch. 68, §§ 50-59 (1959) *Support of Dependents*. The repeal, ILL. ANN. STAT. ch. 68, §§ 50-59 (Supp. 1972) provided: "The subject matter of the repealed sections is now covered by the Revised Uniform Reciprocal Enforcement of Support Act, section 101 *et seq.* of this chapter."

73. PA. STAT. ANN. tit. 23, § 45 (1955).

support of indigents.<sup>74</sup> Also, and significantly, it should be noted that despite the heavier burden placed on the male under the statute both the Uniform Reciprocal Enforcement of Support Act<sup>75</sup> and the Pennsylvania Civil Procedural Support Law<sup>76</sup> are drawn without regard to sex.

The grounds necessary to establish desertion also differ between the sexes. A husband is found to have deserted, and is therefore liable for support, if he leaves home without reasons amounting to grounds for divorce.<sup>77</sup> Grounds for divorce are virtually his only defense to a support action before entry of a valid divorce decree if he is the one who abandoned the marital domicile.<sup>78</sup> The wife, on the other hand, can leave home with impunity and still retain her marital rights if she can prove reasons for her separation that are adequate in law. There is no need for her to prove grounds for divorce.<sup>79</sup> The discrepancy in the burden of proof required for men and women in the same circumstance to prove the same thing, desertion, creates a serious question as to the legal validity of such a double standard of proof.<sup>80</sup>

Another questionable interpretation of the law as defined by the courts is the legal recognition of the husband as the head of the household.<sup>81</sup> Mr. Justice Black noted with some surprise the prevalence of hangovers from the supposedly obsolete institution of coverture in the dissenting opinion to a 1966 case:

Coverture . . . rests on the old common law fiction that the husband and wife are one. This rule has worked out in reality to mean that though the husband and wife are one, the one is the husband. This fiction rested on what I had supposed is today a completely discredited notion that a married woman, being female, is without capacity to make her own contracts and do her own business. I say "discredited" reflecting on the vast numbers of women in the United States in the professions. . . . It seems at least unique to me that this court in 1966 should exalt this archaic remnant of a primitive caste system to an honored place among the laws of the United States.<sup>82</sup>

However obsolete are the laws of coverture, the husband's right to be boss in his household is universally honored.<sup>83</sup> This gives him

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74. PA. STAT. ANN. tit. 62, § 1973 (1968).

75. PA. STAT. ANN. tit. 62, § 2043.1-30 (1968).

76. PA. STAT. ANN. tit. 62, § 2043.31-44 (1968).

77. *E.g.*, *Commonwealth ex rel. Iezzi v. Iezzi*, 200 Pa. Super. 584, 190 A.2d 334 (1963).

78. *E.g.*, *Commonwealth ex rel. Davidoff v. Davidoff*, 178 Pa. Super. 549, 115 A.2d 892 (1955).

79. *E.g.*, *Darges v. Darges*, 202 Pa. Super. 330, 195 A.2d 847 (1964).

80. *See Doelp v. Doelp*, 219 Pa. Super. 241, 281 A.2d 721 (1971).

81. *See* notes 15, 17-21 and accompanying text *supra*.

82. *United States v. Yasell*, 382 U.S. 341, 351 (1966).

83. *Pattberg v. Pattberg*, 94 N.J. Eq. 715, 120 A. 790 (1923) (husband's discretion as to how his family lives is almost unbounded).

the right to determine where<sup>84</sup> and how the family lives,<sup>85</sup> within a wide latitude of discretion. He forfeits the right when the court finds he has been guilty of desertion, in which case he cannot continue to determine exactly how family money is to be spent.<sup>86</sup> From the legal enforcement of what might better be left a social custom stems the case where a wife attempts by way of litigation to improve her condition in the house. Some jurisdictions will go to great lengths to avoid interfering in a marital relationship where the parties remain living under the same roof, holding that there is no legal basis for the claim.<sup>87</sup> The husband is said to be fulfilling his duty as long as the spouses are living together as husband and wife.<sup>88</sup>

Pennsylvania does not suffer the married woman to be maintained in such straightened conditions. Where a wife was forced to take her children to eat at the houses of friends, being without resources herself after her hard work over the years had helped her husband to amass a sizable nest egg, one court found neglect and entered a support order although the household was at least superficially intact.<sup>89</sup> This is not the general rule for every case of a parsimonious husband, however, and by no means are all petitioners who balk at the humiliation of begging for grocery or clothing money granted relief.<sup>90</sup> The court appears reluctant to interfere with the husband's domain. As noted by the Pennsylvania Supreme Court: "[t]he method whereby a husband secures to his wife and family the necessities of life is not a proper subject for judicial review. . . ."<sup>91</sup> As a practical matter the courts tend to note anti-

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84. *E.g.*, *Commonwealth ex rel. Pitucci v. Pitucci*, 200 Pa. Super. 591, 189 A.2d 912 (1963).

85. *See, e.g.*, *Commonwealth ex rel. Glenn v. Glenn*, 208 Pa. Super. 206, 222 A.2d 465 (1966).

86. *Commonwealth ex rel. Iezzi v. Iezzi*, 200 Pa. Super. 584, 190 A.2d 334 (1963).

87. *McGuire v. McGuire*, 157 Neb. 126, 59 N.W.2d 336 (1953) The facts of this case represent an extreme example of this attitude. Here an affluent farmer insisted on keeping his wife in a home without plumbing with a poorly functioning coal heater and old furniture. He failed to provide her with clothing and gave her no money for her own use. She, however, more than performed her "wifely duties" working not only in the house but in the fields with her husband. Her long suffering virtues proved to be at least a part of her undoing. As the court denied her support, insisting that to allow such an award required that the parties be separated, it pointed out things couldn't be that bad since she had stood it for thirty years of marriage.

88. *Id.*

89. *Commonwealth v. Peters*, 88 Montg. 196 (Pa. Q.S. 1967).

90. *See, e.g.*, *Commonwealth ex rel. Glenn v. Glenn*, 208 Pa. Super. 206, 222 A.2d 465 (1966).

91. *Commonwealth v. George*, 358 Pa. 118, 124, 56 A.2d 228, 231 (1948).

social behavior of the man, and where matters of drinking, other women or gambling are involved they are inclined to judge the wife's petition with more leniency.<sup>92</sup> It would seem that with the new amendment the courts would at least be constrained to reconsider the man's primary authority in regard to the family's living style.<sup>93</sup>

In evaluating a wife's right to support there is one final area where one sex sustains a heavier burden than the other. This is the weight the court gives to the conduct of the parties in determining their rights and duties. As far as the man is concerned, once it is determined that he failed in his duty to his family no more consideration is given to his behavior. It is repeated that the law's purpose is not to punish him for misconduct but to provide the necessary support to his wife.<sup>94</sup> On the other hand if the wife fails to behave herself as a virtuous woman, she might lose her right to support. Any conduct that would give the husband grounds for divorce, occurring at any time before or after the initial order is granted could cause the support necessary for her maintenance to be withdrawn.<sup>95</sup> Even if the husband is unable to successfully maintain a divorce action on the grounds of the wife's misbehavior due to his own conduct, the award will be denied her.<sup>96</sup> Seemingly, wifely misconduct is being punished, while at the same time the husband is expressly free from suffering judicial chastisement for his misdeeds.

### III. DETERMINATION OF CONSTITUTIONALITY

The support law clearly accords unequal treatment to married people on the basis of sex alone. Proceeding on this premise the issue presented it whether this treatment can be constitutional under the terms of the equal rights amendment. The passage of constitutional amendments and other legislation has from time to time inspired a reconsideration of numerous state laws which have been reviewed on similar issues.<sup>97</sup> The courts have thus in the past had sufficient practice to become somewhat adept at determining the constitutionality of existing law.

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92. *Commonwealth ex rel. Glenn v. Glenn*, 208 Pa. Super. 206, 211, 222 A.2d 465, 467 (1966).

93. The trend would appear to be away from judicial interference in family matters at all. The rights to marital privacy have been recognized in some private situations. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965). However when there is a clear need for judicial regulation in the less personal areas of finance, the equal rights amendment could cause the court to put the parties on a more equal footing than in the past.

94. See, e.g., *Commonwealth ex rel. Borrow v. Borrow*, 199 Pa. Super. 592, 185 A.2d 605 (1962); *Commonwealth ex rel. Liuzzi v. Liuzzi*, 142 Pa. Super. 239, 15 A.2d 738 (1940).

95. *Commonwealth ex rel. Young v. Young*, 213 Pa. Super. 51, 247 A.2d 659 (1968).

96. *Commonwealth ex rel. McCuff v. McCuff*, 196 Pa. Super. 320, 175 A.2d 124 (1961).

97. See note 12 and accompanying text *supra*.

It has been suggested that the equal protection clause of the fourteenth amendment of the United States Constitution<sup>98</sup> should accomplish or has already accomplished the same result in stemming discrimination by sex as the equal rights amendment.<sup>99</sup> It is true that many prior advances on the front of sex discrimination have been made with reference to the fourteenth amendment.<sup>100</sup> As a result of these gains, however, there arises a distinct possibility that the language of the tests employed in the decisions will be transferred to challenges brought under the equal rights amendment.<sup>101</sup> The danger is that courts might adopt equal protection concepts in deciding any cases touching sex discrimination without regard to which amendment is being used as authority.

The courts have ruled that state laws which accord different treatment to the sexes do not violate the terms of the fourteenth amendment as long as they meet "a requirement of some rationality in the nature of the class singled out."<sup>102</sup>

The prohibition against the denial of the equal protection of the laws does not mean that a state may not recognize differences and create classifications which are based on reasonable and not arbitrary or capricious or unjustly discriminatory differences, or exist by virtue of the very nature of the subject or persons being classified.<sup>103</sup>

The requirement demands at the minimum that any statutory classification bear some rational relationship to a legitimate state purpose. A recent Supreme Court case dealing with the rights of illegitimate children, *Weber v. Aetna Casualty & Surety Co.*,<sup>104</sup>

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98. U.S. CONST. amend. XIV, § 1 "[Nor shall any state] deny to any person within its jurisdiction the equal protection of the laws. . . ."

99. For a discussion supporting this point of view, see *Corso v. Corso*, 120 Pitts. L.J. 83, 193 (Pa. C.P. 1972).

100. See, e.g., *Reed v. Reed*, 404 U.S. 71 (1971). Billed as the equal rights case, this decision represents the first time the Supreme Court grappled with the concept of sex discrimination under the fourteenth amendment.

101. For a concise discussion of the two basic tests evoked for deciding cases under the equal protection clause, see Comment, 76 DICK. L. REV. 160, 174-5 (1972).

102. *Commonwealth v. Daniel*, 210 Pa. Super. 156, 162, 232 A.2d 247, 251 (1967), quoting *Rinaldi v. Yeager*, 384 U.S. 305 (1966). This case challenged the validity of the Muncy Act which provided for heavier sentences for women convicted of the same crime as men. The court here decided that the heavier burden on women was justified due to differences between the sexes which could be related to the purpose of the legislature. The decision was reversed by the Pennsylvania Supreme Court on the grounds that the Act was devoid of reasonable grounds, but the "reasonable classification" test utilized was not disturbed.

103. *Commonwealth v. Daniel*, 430 Pa. 642, 648, 243 A.2d 400, 403 (1968).

104. 406 U.S. 164. (1972).

made clear that the states could not easily avoid the purpose of the fourteenth amendment through the rational basis test as defined above. When the state defined classification tended to impinge sensitive, fundamental personal rights the Court announced its intent to exercise a stricter scrutiny of the statute.<sup>105</sup> In *Weber*, the Court weighed the state's interest in regulating and protecting the legitimate family unit, a venerable state concern, against the personal rights that were endangered by the classification, and decided that whatever value the classification might have had, it was far outweighed by the injury to those whose rights were affected.<sup>106</sup> The language in *Weber* reflects a certain liberal ease with which the Supreme Court discards the restrictive classifications, but it continues to adhere to the basic definition of an acceptable classification.

It must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislature so all persons similarly circumstanced shall be treated alike.<sup>107</sup>

A challenged statutory classification, which the state can demonstrate to a court's satisfaction falls within these guidelines, is allowed to stand regardless of the rights of individuals adversely affected. Should the reasonable classification exception as it is delineated by the courts be applied to the equal rights amendment as it was to the equal protection clause, much of the amendment's contemplated force might be successfully deflected.

Two recent cases<sup>108</sup> have dealt with unequal treatment of the sexes under the fourteenth amendment and found that rather than reasonable the state endorsed classifications were arbitrary and invidious. *Lamb v. Brown*<sup>109</sup> overruled an Oklahoma statute which defined a child who could enjoy the benefits of juvenile court as any male under sixteen years or any female under eighteen. In allowing equal protection to the males, the court discussed the clause.

The fourteenth amendment means "that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances." (citation omitted). The general doctrine is that the amendment, in respect of the administration of criminal justice, requires that

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105. *Id.* at 172.

106. *Id.* at 173.

107. *Eisenstadt v. Baird*, 405 U.S. 438, 446 (1972), quoting *Reed v. Reed*, 404 U.S. 71, 76 (1971). Here the Court finds unconstitutional a statute which limits the acquisition of contraceptives to the class of married people. The court did not deny the State's right to legislate that different treatment be accorded different groups of people, but found the power was curtailed when used to create classes on the basis of criteria wholly unrelated to the object of the Statute.

108. *Reed v. Reed*, 404 U.S. 71 (1971); *Lamb v. Brown*, 456 F.2d 18 (10th Cir. 1972).

109. *Lamb v. Brown*, 456 F.2d 18 (10th Cir. 1972).



no different degree or higher punishment, shall be imposed on one than is imposed on all for like offenses.<sup>110</sup>

The state contended that the discriminatory legislative judgement was premised on "demonstrated facts of life,"<sup>111</sup> but since these facts were not obvious or apparent to the court, the contention was to no avail.

In *Reed v. Reed*<sup>112</sup> an Idaho statute preferring men over women to administer estates was held unconstitutional. The Supreme Court rejected the state's contention that the classification was reasonable because it eliminated areas of controversy thus making administering the selection of executors easier and avoiding a possible hearing.

To give mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the equal protection clause of the fourteenth amendment, and whatever may be said as to the positive values of avoiding intra-family controversy, the choice in this context may not lawfully be mandated solely on the basis of sex.<sup>113</sup>

It is easy to imagine the use of a similar argument to justify the support law as a reasonable classification. Yet even with the reasonable classification exception, the fact that the courts reject arguments such as this casts doubt on the validity of the discriminatory support laws.

To some extent, the support law creates an imbalance of burdens between the sexes to help correct prior existing social and legal discrepancies. Some courts have upheld laws which are discriminatory on the basis of sex in an attempt to correct some such inequality persisting in the social structure. In *Gruenwald v. Gardner*,<sup>114</sup> a social security law allowing certain women a higher payment than men similarly circumstanced was upheld as a classification "which is reasonable in relation to its subject and is adapted in the interests of the community."<sup>115</sup> That the law was favorable to women was considered justified by the provable fact that women as a class earn less and have less opportunity in higher age groups, and the law justly reflects, and corrects, eco-

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110. *Id.* at 20 citing *Missouri*, 159 U.S. 673, 678 (1895).

111. 456 F.2d at 20.

112. 404 U.S. 71 (1971).

113. *Id.* at 254.

114. 390 F.2d 591 (2d Cir. 1968).

115. *Id.* at 592, quoting *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937).

nomic facts of life. Protective legislation ostensibly passed to ease for women the realities of the harsh working world fared less well under the Civil Rights Act<sup>116</sup> than did legislation such as that upheld in *Gruenwald* under the fourteenth amendment. Recent cases have consistently held that female protective statutes governing employment practices could not be preserved under the Civil Rights Act.<sup>117</sup> It would seem that at least some ground has been cleared in removing from the law statutes designed to protect women, although it is by no means clear that such action has had any decided effect on the state of support law.

#### A. *Challenges in the Courts*

The implications of the equal rights amendment have not yet been tested by the higher courts of Pennsylvania. One support case that reached the superior court footnoted a comment to the effect that the court was not considering the force of the amendment on the parties' rights at that time since the issue had not been raised by counsel.<sup>118</sup> However, two recent cases from Allegheny County and one from Delaware County have confronted the challenge of the amendment. The first, *Corso v. Corso*,<sup>119</sup> declared divorce from bed and board<sup>120</sup> in violation of the equal rights amendment in that it was a remedy available only to a wife, i.e. woman.<sup>121</sup> In a lengthy and diverse opinion, the court reviewed the origin of the divorce from bed and board, the changing and developing position of women, the background of domestic relations law in general and both the federal and Pennsylvania equal rights amendments. Numerous cases, commentaries, studies and articles as well as many selections from the Congressional Record are cited therein to substantiate the court's holding. The imbalance in the divorce from bed and board remedy clearly abridged equality of rights because of the sex of the individual, according to the court, but the opinion also casts doubt on every other area of domestic relation law, including support,<sup>122</sup> that endorses determination of rights, roles or liabilities by sex. Two months later the same court handed down another decision,<sup>123</sup> this time de-

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116. Civil Rights Act, 42 U.S.C. § 2000e-2 (1970):

It shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual's . . . sex. . . .

117. See *Jones Metal Products Co. v. Walker*, 29 Ohio Stat 2d 173, 281 N.E.2d 1 (1972) for a cogent analysis of the effect of the Civil Rights Act on state law protecting females. See also *Phillips v. Martin Marrietta Corp.*, 400 U.S. 542 for a discussion of the "bona fide occupational qualification" interpretation of the Civil Rights Act.

118. *Crissman v. Crissman*, 220 Pa. Super. 387, 281 A.2d 719 (1971).

119. *Corso v. Corso*, 120 Pitts. L.J. 183 (Pa. C.P. 1972).

120. PA. STAT. ANN. tit. 23, § 11 (1955).

121. *Corso v. Corso*, 120 Pitts. L.J. 183, 197-8 (Pa. C.P. 1972).

122. *Id.* at 188.

123. *Kehl v. Kehl*, 120 Pitts. L.J. 296 (Pa. C.P. 1972).

claring unconstitutional the wife's statutory right to alimony pendente lite and counsel fees<sup>124</sup> on the grounds that it discriminates against the husband on the basis of sex. The court cited *Corso* as authority.

The only case which has dealt directly with the question of the constitutionality of support is *Lukens v. Lukens*,<sup>125</sup> decided in September 1972. Here the court distinguished *Corso* and found for the wife ruling that "a wife is not automatically entitled to support just because she is a woman"<sup>126</sup> and that the law "does not arbitrarily and capriciously operate to deny the equal rights of a male or female solely because of sex, but realistically serves to resolve a problem which arises from the relationship of marriage."<sup>127</sup> The opinion begins with a careful and accurate discussion of the principle of article 1, section 27 of the Pennsylvania Constitution.

Sex alone is no longer a permissible factor in determining the legal rights of women, or of men. . . . The law may, of course, impose different benefits or different burdens upon different members of the society. But that differentiation in treatment must rest upon particular characteristics or traits of the persons affected. . . . Under the Equal Rights Amendment the existence of such a characteristic or trait to a greater degree in one sex does not justify classification by sex rather than by the particular characteristic . . . .<sup>128</sup>

After manifesting this clear understanding of the amendment's intent and purpose, the court abruptly shifts to the reasonable classification language used in interpreting the equal protection clause of the fourteenth amendment.

The prohibition . . . does not mean that a state may not . . . create classifications which are based upon reasonable and not arbitrary or capricious differences. . . . Thus, the question before this court is: whether the Act of 1939 is based upon a reasonable classification.<sup>129</sup>

It appears from this statement of the issue that the court was not considering the question raised by the equal rights amendment at all, but was deciding the case on the basis of the fourteenth amendment, thus bringing all that voluminous body of court decisions into play as controlling precedent. An effort is made to show that

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124. PA. STAT. ANN. tit. 23, § 46 (Supp. 1972).

125. Del. Co. (Pa. C.P. 1972).

126. *Id.* at

127. *Id.* at

128. *Id.* at

129. *Id.* at

the law does not differentiate between the sexes at all, but only between husband and wife as parties to the marital contract. This logic appears faulty at first glance since it is almost universally accepted that the class of wives is entirely encompassed within the class of women. It was clearly and commendably the intent of this court to do justice in the given instance by providing support for a needy wife. Where the parties were already in an unequal position, the court sought to avoid further oppression of the woman by interpreting the law in such a way that it would place them on an equal basis. But it seems in pursuing this laudable goal the court misapplies the law robbing the equal rights amendment of much of its power and reducing it to the language of the fourteenth amendment.

### B. *The Courts' Perrogatives*

Appellate review of the equal rights cases could produce any one of a number of results with regard to support law. The law could be found constitutional and upheld as in *Lukens*, using arguments of equal protection origin and manifesting a desire to equalize what is essentially an unequal arrangement in marriage. On the other hand the questionable support statutes could be held unconstitutional and simply invalidated, rendering the statutes unenforceable as in *Corso*. This move does not shock the conscience when an archaic divorce from bed and board statute is invalidated, but some reaction might be expected should the concept of a husband's duty to support his wife suddenly be stricken from the law.

A brief examination of the support law's effect, however, might indicate that this change is not quite so drastic as it first appears and fear of inflicting greater harm on financially dependent wives is largely unfounded. The rights of these women are already uncertain in Pennsylvania since they can be denied or lost upon proof of the wife's misconduct or on the entry of a valid divorce decree.<sup>130</sup> Frequently, when the award is allowed, the order is for an amount so low that it represents merely a token gesture of satisfying the law and does little toward maintaining the family. A Pennsylvania judge was reported to say, "[t]he support court usually sets the amount of a support order at the highest figure the defendant seems capable of paying. Even then the amount is usually not enough to support the wife and children on a minimal basis."<sup>131</sup> Furthermore, those support orders which are entered are poorly enforced. Statistical data on collection of support money gathered in a study in a metropolitan Wisconsin community was reproduced in the

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130. See notes 49-52 and accompanying text *supra*.

131. Citizens Advisory Committee on the Status of Women, Washington, D.C.; *The Equal Rights Amendment and Alimony and Child Support Laws*, Jan. 1972 at 7.

Hastings Law Journal, November 1971.<sup>132</sup> The chart reveals that one year after the support order only thirty-eight per cent of the fathers were still in full compliance, and at the end of ten years, only thirteen per cent were still making regular payments. The Philadelphia County Court Report Statistical Summary shows that a nearly equal number of actions were filed to enforce unpaid existing support orders as there were actions to obtain support for the year 1967.<sup>133</sup> It thus appears that support orders present a somewhat less than successful means of maintaining the dependent half of an estranged family.

Perhaps invalidating those support laws which specifically name the husband as bearing the burden alone would not have too devastating an impact, particularly since these constitutionally suspect laws do not represent the full range of remedies for support. Recourse could still be had to those laws allowing support for family members by others in the family as well as the Civil Procedural Support Law and Uniform Reciprocal Enforcement of Support Act which both allow for enforcement of support actions without regard to sex.<sup>134</sup>

Traditionally the courts have not limited themselves to merely upholding or invalidating questionable legislation. They have shown themselves willing to extend the benefit of a law to classes previously slighted,<sup>135</sup> particularly when ruling on the effect of the equal protection clause of the fourteenth amendment.<sup>136</sup> However if this extension appears to the court as a judicial attempt to rewrite the law, or to legislate what is essentially a new law, it is likely to balk at expanding the law's benefits. Historically courts have been unwilling to act affirmatively where substantial revision of

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132. S. Nagel and L. Wutzman, *Women as Litigants*, 23 HAST. L.J. 171, 189-90. This study was based on data gathered by Kenneth Eckhardt from a 1955 sample of fathers ordered in divorce decrees to pay child support. See K. Eckhardt, *Deviance, Visibility and Legal Action: The Duty to Support*, 15 SOC. PROB. 470 (1968). The former article points out if noncompliance in support for children is so great, it is probably still greater where support for the wife only is decreed.

133. PHILADELPHIA COUNTY COURT REPORT: STATISTICAL SUMMARY, 1967, 373, 386.

134. See notes 66-72 and accompanying text *supra*.

135. When the nineteenth amendment giving women the right to vote was ratified, the courts extended the voting laws to include women rather than invalidating what was such an essential area of legislation. For a more detailed discussion of the concept of the court's willingness to extend the benefits of a given law, see Brown, Emerson, Falk and Freeman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 874, 912.

136. See, e.g., *Sweatt v. Painter*, 339 U.S. 629 (1950).

the law is necessary.<sup>137</sup> In the case of support law, there would be no requirement of extensive judicial redrafting to equalize its effect. However, revising it to include both sexes would involve extending a burden to one group, that of the wife, while benefitting the group of husbands. The courts will rarely alleviate statutory discrimination if it means enforcing a new restriction or burden against a previously excluded group, particularly if the statute to be extended is criminal.<sup>138</sup>

### C. Possible Legislative Action

Action to bring the support law within the confines of the equal rights amendment is not limited to the courts. Three proposed House Bills have already been introduced before the General Assembly of Pennsylvania. Bills number 2241<sup>139</sup> and 2243<sup>140</sup> would change the civil support law,<sup>141</sup> and the divorce from bed and board statute,<sup>142</sup> to read "spouse" wherever the present law has "husband" or "wife" or like language specifying sex. Of course the effect of such a change would be to give equal rights for support, and shared liabilities, to both men and women in a marriage. Proposed Bill number 2242<sup>143</sup> is introduced to repeal section 4733 of the Penal Code<sup>144</sup> which makes desertion and nonsupport a criminal offense, thus eliminating any question of discriminatory wording.

One of the most sensible solutions to a host of problems in the domestic relations area, including the support issue, is the Uniform Marriage and Divorce Act<sup>145</sup> which is recommended for enactment in all states by the National Conference of Commissioners on Uniform State Laws. Among other things, the proposed Act provides for the division of property and maintenance in the event of separation or dissolution of marriage. Section 308, Maintenance,<sup>146</sup> presents a wise alternative to the present method of determining duties and rights by allowing either spouse the benefits of support if the financial condition of that spouse falls within certain guidelines. The spouse seeking support must, first, lack sufficient property

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137. This hesitancy dates back to *United States v. Reese*, 92 U.S. 214 (1825), and has been a continuing tradition with the courts.

138. *E.g.*, *Commonwealth v. Daniel*, 430 Pa. 642, 243 A.2d 400 (1968) challenged the constitutionality of the Muncy Act and the court, after finding that women unjustifiably received heavier sentences than men, extended the benefit of the men's more lenient law to women rather than extending the women's harsher law to the males.

139. H.B. 2241, 156th Sess. (1972).

140. H.B. 2243, 156th Sess. (1972).

141. PA. STAT. ANN. tit. 48, § 131 (1965).

142. PA. STAT. ANN. tit. 23, § 11 (1955).

143. H.B. 2242, 156th Sess. (1972).

144. PA. STAT. ANN. tit. 18, § 4733 (Supp. 1972).

145. UNIFORM MARRIAGE AND DIVORCE ACT, National Conference of Commissioners on Uniform State Laws, Aug. 1-7, 1970 as amended, Aug. 27, 1971.

146. *Id.* § 308 at 36.

to provide for his own needs and, second, be unable to support himself through appropriate employment or be the custodian of a child whose condition requires the presence of the parent.

The section further provides that the award shall be as the court deems just without consideration of marital misconduct of either party.<sup>147</sup> This express admonition that the court should not indulge in judicial chastisement of erring spouses by means of the support order is stressed again in the comment following the section. It solves the problem of discrepancies which have crept into the existing laws that have granted or denied support payments on the basis of the wife's behavior while declaring that a support order was not intended as punishment for a defaulting husband.

The factors on which the amount of the award is based include consideration of the resources of the dependent party, retraining or education necessary to prepare for appropriate employment, the condition of the marriage, and the ability of the supporting spouse to provide.<sup>148</sup> The well reasoned and fair intent of the section is stated in the comment. It is designed to encourage adequate provisions for the spouses by property division, and the support order is only to be utilized in a case where the property is insufficient to provide the spouse's needs.<sup>149</sup> The Act also includes a provision for the payment by one spouse for the attorney fees of the other if the court should find such an order necessary.<sup>150</sup> Again, this section does not base the award on the sex of the parties. The Uniform Marriage and Divorce Act seems to provide a fair and reasonable way of bringing the complicated area of law dealing with the formation and dissolution of family units into the purview of the equal rights amendment.

#### IV. CONCLUSION

It is clear that among the numerous statutes dealing with support in Pennsylvania, several discriminate between the sexes in assigning rights and duties of maintenance. After a review of the law it would seem that not only are these discriminatory statutes unconstitutional, but the entire range of Pennsylvania's support law is hopelessly confused in an unnecessary plethora of statutes, most wrestling with substantially the same objective. Upon arriving at this conclusion, the solution becomes obvious: restructure the law

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147. *Id.* § 308(b) at 36.

148. *Id.* § 308(b) (1)-(6).

149. *Id.* Comment to § 308 at 37.

150. *Id.* § 313.

to meet the requirements of the equal rights amendment, and while so doing, revise and consolidate the whole body of support law into a comprehensible unit. To produce the happiest result and still meet the requirements of the amendment it would appear that the scope of the law as it applies to married persons should be broadened to include both sexes as recipients of the benefits of support. This result, and that of pulling together the whole range of support law, could only be achieved with any reasonable effectiveness by legislative action. Without such action, the courts will be forced into the uncomfortable position of either declaring the offending support statutes unconstitutional and unenforceable or of allowing them to stand and thus create precedent which weakens the impact of the equal rights amendment making it virtually ineffective.

Should the legislature undertake revision of the discriminatory sections of the law, it should take the opportunity to review the law in its entirety. It is suggested that in so doing the use of appropriate sections of The Uniform Marriage and Divorce Act as a guide would aid in creating a law that is acceptable under the equal rights amendment, yet still accomplishes the goal of the present legislation by extending the remedy under the law equally to both sexes.

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